IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1637 of 2003
With
CRIMINAL APPEAL No. 1638 of 2003
With
CRIMINAL APPEAL No. 27 of 2004
With
CRIMINAL APPEAL No. 242 of 2004
With
CRIMINAL APPEAL No. 244 of 2004
With
CRIMINAL APPEAL No. 264 of 2004
With
CRIMINAL APPEAL No. 267 of 2004
With
CRIMINAL APPEAL No. 297 of 2004
With
CRIMINAL APPEAL No. 738 of 2004
With
CRIMINAL APPEAL No. 739 of 2004
With
CRIMINAL APPEAL No. 740 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH Sd/-

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

1 & 2 YES; 3 to 5 NO

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JUNED FARUQ HAYAT & 13 OTHERS- Appellants

Versus

STATE OF GUJARAT - Opponent

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Appearance :
MS NITYA RAMAKRISHNAN, Advocate with MR AJ YAGNIK Advocate for Appellants
MR ARUN D OZA PUBLIC PROSECUTOR with MR JM PANCHAL Advocate for Opponent-State.
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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 08/12/2005

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.H.WAGHELA)

1. These appeals have arisen from the orders of the learned Special Judge (POTA) rejecting the applications of the appellants for regular bail and have come up before this Court under sub-section (4) of section 34 and section 49 of the Prevention of Terrorism Act, 2002 (hereinafter referred to as “POTA”) after about a year of the impugned orders. The appellants are the persons accused in POTA Case No.1 of 2003 pursuant to Godhra Railway Police Station C.R.I-9 of 2002 alleging offences punishable under sections 147, 148, 149, 337, 338, 334, 153-A, 302 and 307 of the Indian Penal Code, 1860 (“the IPC” for short), under section 141, 151 and 152 of the Indian Railway Act, under sections 3 and 4 of the Prevention of Damages to Public Properties Act and under sections 3 (2) and 3 (3) of the POTA for the alleged offence of burning of coach No.S-6 of

Sabarmati Express train on 27.2.2002 at about 7.45 a.m. at Godhra Railway Station wherein 59 persons were killed and 48 persons were seriously injured. It needs to be noted at the outset that similar plea for bail made in another batch of appeals, which were filed subsequent to the present set of appeals, has been decided on 30.10.2004 by another Bench of this Court (Coram: R.K.Abichandani & H.N.Devani, JJ) after setting out in detail the facts and contentions. The present set of appeals were argued together on similar grounds and it was fairly conceded that, in the aforesaid batch of appeals, the basic facts, Crime Register Number of the offence and the allegations and contentions thereon were the same or similar. However, it was elaborately argued that the decisions and observations in those appeals were not binding as a precedent for the facts which were not in issue and the contentions which were not raised in those appeals. Therefore, the special facts which were highlighted in the present set of appeals and the additional submissions which were made are required to be dealt with and the basic facts and arguments being the same, all the appeals are decided by this common judgment.

2. With the above background, the version emanating from the police papers, summarised as under by the other Bench of this Court, may be adopted:

> *"2.1 .....In short, when the said train reached Godhra railway station in the morning at about 7.43*

a.m., i.e. much later than its scheduled time of 2.55 a.m., there was some minor incident on the platform with a tea-vendor and after the train started at 7.48 a.m., the chain was pulled around 7.50 a.m. Thereafter, it started again at 7.55 a.m. but after some distance, the chain was pulled again simultaneously from four compartments at 7.58 a.m.and it stopped near "A" cabin only about 332 meters from the platform and the incident is said to have taken place around 8.00 a.m.when a large number of people had attacked and set on fire the said compartment S-6. These persons came from a nearby area including from Signal Faliya. As per the police papers, on the previous evening, petrol cans were stored in the nearby Aman Guest House. At the time of the incident, these were used for setting the compartment on fire. When the train halted, members from the mob, who wanted to attack the compartment, pelted stones, banged iron pipes, lathis etc.and by cutting open the vestibule, entered the compartment S-6, poured inflammable substances in it like petrol and set it on fire. The persons forming an unlawful assembly tried to prevent the passengers from getting down from the burning coach. R.P.F.and other police people reached on the spot and tried to control the mob by firing a few shots, perhaps in the air. However, the incident appears to have occurred in a very well planned and swift manner, because, within few minutes of the halting of the train, it was attacked by a huge mob, armed with lethal weapons and cans of inflammable material like petrol, kerosene and acid were soon brought and the coach number S-6 was systematically attacked and set ablaze, leading to charring of 59 living human beings and injuries to 48 persons."

2.1 After lodging of the FIR, about a dozen chargesheets (reports) under section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short) have been filed and offences under the provisions of the Prevention of Terrorism Ordinance, 2001 (POTO 2001) and POTA 2002 were added. After considering the facts related to individual submissions and the contentions of the counsel, the other Bench in the other set of appeals, recorded its findings as under:

> *"8. We have been taken through the record at great length and have considered the submissions of both the sides. Since the question involved is as to whether bail should be granted or not, it would not be appropriate on our part to express opinion on the reliability of the evidence on any argumentative grounds urged by the learned counsel for the parties. Police statements of witnesses, statements recorded under Section 164 of the Code before the Judicial Magistrate, statements recorded under Section 32 of the POTA, and other record which is read before us, prima facie shows that substantial quantity of inflammable substance like petrol had been accumulated beforehand at a nearby place, and as soon as the train was halted by pulling chain, the same was used for setting bogey no.6 on fire around 8.00 a.m.on 27th February, 2002. There are statements indicating that two meetings had taken place in the Aman Guest House, Signal Faliya, Godhra in the night of 26th February, 2002, wherein Haji Bilal and Faruk Bhana had communicated a*

specific instruction of Maulvi Hussain Umarji for setting bogey no.S-6 of the Sabarmati Express coming from Ayodhya on fire. For this purpose, Abdul Rajak Kurkur the owner of the guest house and his close associates were asked to collect petrol in the night of 26th February, 2002 itself and 140 litres of petrol had been collected from a nearby petrol pump and kept in the Aman Guest House in the night of 26th February, 2004 (Statement under Section 164 of the Code before the Judicial Magistrate given by Jabir Bin Yamin Bahera on 5th February, 2003). It also appears that the movement of train was verified from the Godhra railway station in the early hours of 27th February, 2002, as it was running four hours behind the schedule. The chain pulling was done simultaneously from various compartments soon after the train started after the first chain pulling which was done at the platform. The petrol cans which were stored at Aman Guest House were taken in a loading rickshaw near the "A" cabin and the bogey was set on fire by putting burning rags inside the compartment and through broken windows by the miscreants. Few culprits had forcibly entered the compartment by cutting open the vestibule and petrol was emptied in that compartment. The passengers were terrorised by beating them and pelting of stones and were prevented from coming out from the burning compartment. Provocative slogans were shouted from the loudspeaker from a nearby mosque to arouse passions in the violent mob. Fire tenders were prevented from going near the place of the incident. Jabir Bin Yamin Bahera who gave his

confessional statement under Section 164 has given graphic details of the conspiracy. Moreover, Salim @ Salman Yusuf Sattar Jarda, has also given the similar version in the statement recorded under Section 32 of the POTA, on 20th June, 2004. We are, therefore, prima facie satisfied that there is sufficient material to indicate that conspiracy was hatched for attacking the compartment in which Kar Sevaks were travelling from Ayodhya and that inflammable material was collected on the previous night i.e. On 26th February, 2002 in the Aman Guest House, which was quite near the place of the incident that took place near "A" cabin, where the train was halted after simultaneous pulling of chain from four compartments and where a mob of 900 persons attacked the train and some of them set the compartment S-6 on fire by using petrol, which was collected on the earlier evening. Swift manner in which the entire operation of attacking the said compartment of the train took place indicates that it was a well planned out attack for achieving the common object of committing these crimes for which the accused are chargesheeted."

(emphasis added)

2.2 On the above findings, all the appeals in the said group, except one involving doubtful identity of the accused, were dismissed with the observation that they were not fit cases for granting bail.

3. The appellants herein are, broadly speaking, part of the mob attacking coach No.S-6 from outside, according to the prosecution case. It was argued for the appellants that out of all the arrested and absconding accused, some were stated to have been arrested on the spot on 27.2.2002 at about 10.00 a.m., some were arrested late in the night with weapons and some were arrested only on the basis of the statements of a single witness recorded afterwards. None, except one, has been subjected to identification parade. By the time the first chargesheet was submitted on 22.5.2002, the police had the F.S.L. Report on 17.5.2002 showing the impossibility of the coach being set on fire from outside. By the second chargesheet, filed on 20.9.2002, the theory of burning of the coach from inside by a core group of conspirators had gained ground. There was material to suggest that the mob had gathered around the coach upon hearing that a girl was pulled into the train and chain-pulling was done by one Anwar Kalender who was not even arraigned as an accused. On the basis of these and other facts transpiring during the course of investigation and further investigation, it was submitted that, even according to the prosecution case, there was a small core group of provocateurs acting on a pre-planned conspiracy and general mob had gathered spontaneously as a result of the rumour spread by the core group. Out of the mob collected and operating outside the coach at the relevant time, the appellant in Appeal No.1637 of 2003 (Junaid Farouk Hayat), in Appeal

No.27 of 2004 (Inayat Abdul Sattar Jujhara) and in Appeal No.264 of 2004 (Abdul Sattar Ismail Giteli) are alleged to have been spotted in the mob and rounded up at 10.30 a.m. but shown to have been arrested at 21.30 hours on 27.2.2002. Similarly, the appellants in Appeal No.738 of 2004 (Asgharali Kamruddin, Kamal Badshah Mohammed Sharif and Taiyebhusen Abdul Haq Khoda) have been arrested subsequently on 28.2.2002 on the basis of the statements of eye witnesses recorded later and discovery panchnamas have been made even later wherein weapons or articles attributed to them could not be recovered through or in presence of the accused themselves. The appellant in Appeal No.1638 of 2002 (Asifbhai Siddik Kadar) was arrested on 14.3.2002 on the basis of the statements of two eye witnesses which were recorded on 7.3.2002. The appellant in Appeal No.242 of 2002 (Shabir @ Bhupat Bhuriyo Abdul Rahim Badam), in Appeal No.244 of 2004 (Mohammed Sayeed Abdulsalam Badam) and the appellant in Appeal No.297 of 2004 (Muzaffar Usman Hayat) were arrested months after the incident on the basis of the statement of one Dilipbhai U.Dasadiya who had subsequently contradicted his own statement about his presence at the spot by making an affidavit. The appellant in Appeal No.267 of 2004 (Mohammed Musharafkhan Ashrafkhan Pathan) was also subsequently arrested only on the basis of the statement of one Dipak N.Soni, which was recorded on 2.3.2002. Similarly, the appellant in Appeal No.267 of 2004 (Abdul Raouf Ahmadi Yayman) was subsequently arrested

only on the basis of the statement of Harsukhlal T.Advani. Nothing was recovered from either of those last mentioned two appellants and all that was alleged against them was that they were present in the mob. The appellant in Appeal No.739 of 2004 (Idris Yusuf Ismail Ravan) was arrested about a year after the incident, as a person in the mob, on the basis of the statements of eye witnesses and an iron bar was stated to have been recovered through his wife. Lastly, the appellant in Appeal No.740 of 2004 (Ishaq Mohammed Mamdu) was alleged to be present in the mob, whereas he was certified by a qualified doctor to have vision upto a distance of one metre only.

3.1 With the above background of facts in individual cases, it was submitted by learned senior counsel Ms.Nitya Ramakrishnan, appearing for the appellants, that, if a person was arrested on the spot with a weapon, there could not be a subsequent recovery of the same weapon from the same person in custody and if the weapons attributed to the accused were recovered subsequently at the time of making the arrest panchnama, he could not have been arrested on the spot. Even in the batch of similar appeals decided earlier, it was observed by the other Bench in the judgment in Criminal Appeal No.600 of 2004 that joint discovery panchnama made at the instance of one of the accused persons could not be used against another. Therefore, the time and place of arrest and recovery and discovery of weapons in the

present cases were doubtful, according to the submission. It was submitted that the appellants like Ishaq Mohammed Mamdu, who is practically blind, or Inayat Abdul Sattar Jujhara, who is a 57 years old government servant, could not be believed to be operating in the mob. In fact, in the case of Inayat Abdul Sattar Jujhara, a certificate was issued by his superior officer, an Executive Engineer, in effect stating that he had attended his office for some time on the fateful day. The eye witness, namely, Dilip U. Dasadiya, on the basis of whose statement three of the appellants are stated to have been arrested and who had subsequently made an affidavit to contradict himself was, according to the police papers itself, on duty as a teacher at 10.40 a.m. on 27.2.2002 and had taken half-day leave subsequently to return to Godhra at 1.30 p.m. on 27.2.2002, according to the submission.

3.2 It was submitted by Ms.Ramakrishnan that, besides the peculiar facts in particular cases of the present appellants, the report dated 16.5.2005 of the Central Review Committee on POTA (2) headed by Hon'ble Mr.Justice S.C.Jain has, after considering all the chargesheets and after appreciating the evidence made available to them and considering the arguments of the learned counsel, clearly opined that the incident as alleged had taken place not as a part of conspiracy as envisaged under the provisions of POTA and has taken the view that the accused persons may not be tried under the provisions of POTA.

3.3 It was also submitted for the appellants that the appellants could possibly be tried for and at the most convicted of rioting and, in such circumstances, their imprisonment before trial for a period exceeding three years would be wholly unjustified. Even after the impugned orders and the decisions in the other group of appeals one more year had passed and the trial was likely to take any number of months, if not years, according to the submission.

3.4 The learned counsel relied upon the order dated 14.2.2003 of the learned single Judge of this Court in Criminal Misc. Application No.607 of 2003 wherein the factum of the presence of the accused in the mob which was disclosed only by the aforesaid eye witness, namely, Dilip U. Dasadiya, was taken note of along with the fact that the accused therein was already tried in connection with the offence of communal misbehaviour and was acquitted. The learned counsel relied upon the judgment of the Supreme Court in ***Shaheen Welfare Association vs. Union of India & Others [(1996) 2 SCC 616)*** to submit that, while adopting a pragmatic and just approach, all the accused cannot be dealt with by the same yardstick. Different approaches would be justified on the basis of the gravity of the charges. In the facts of that case, under-trial prisoners were divided into four groups. Under-trials falling in group (a) could not receive liberal treatment. Cases of under-trials

falling in group (b) were differently dealt with. If they had been in prison for five years or more and their trial was not likely to be completed within the next six months, they were held to be required to be released on bail unless the Court came to the conclusion that their antecedents were such that releasing them could be harmful to the lives of the complainant, the family members of the complainant, or witnesses. Cases of under-trials falling in groups (c) and (d) were dealt with leniently and were held to be entitled to be released on bail if they had been in jail for three years and two years respectively. It was also observed in paragraph 15 of the judgment that the directions may not be applied in exceptionally grave cases such as the Bombay Bomb Blast case where a lengthy trial was inevitable looking to the number of accused, the number of witnesses and the nature of charges unless the Court felt that the trial was being unduly delayed.

3.5 The judgment of the Supreme Court in ***Usmanbhai Dawoodbhai Memon & Others v. State of Gujarat [(1988) 2 SCC 271]*** was relied upon in support of the submission that cases of communal riots resulting in offences of murder, arson, looting etc. have to be distinguished from incidents giving rise to acts of physical violence resulting in communal riots due to instigation and the case of each accused was required to be closely examined and the application for bail cannot be mechanically rejected.

Relying upon the judgment of the Supreme Court in ***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Another [2004 SCC (Cri) 1977],*** it was submitted that the nature of accusation, severity of punishment in case of conviction and the nature of supporting evidence, reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and *prima facie* satisfaction of the Court about the charges were relevant factors required to be considered by the Court in the matter of granting bail. It is, however, also observed in the same judgment that in cases where the accused stands charged of offence punishable with life imprisonment or even death penalty, the mere fact that the accused had undergone certain period of incarceration by itself would not entitle the accused to be enlarged on bail; nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the accused on bail when the gravity of the offence alleged is severe. It is also observed by the Hon'ble Supreme Court that admissibility or otherwise of confessional statement and the effect of evidence already adduced by the prosecution and the merit of evidence that may be adduced were all matters to be considered at the stage of trial.

3.6 The judgment of the Supreme Court in ***State v. Nalini and Others [(1999) 5 SCC 253]*** was relied upon for the proposition that the offence of criminal

conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in such case is, did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed. It is also observed in the same judgment that conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. As against the above special facts and the contentions based thereon, it was submitted by Mr.Arun D.Oza, learned Public Prosecutor, appearing with learned counsel Mr.J.M.Panchal for the State, that chargesheets making out cases of serious offences against each of the appellants have been filed in the Court and, if the interim injunction granted by the Supreme Court on 29.8.2005 in the petitions for Special Leave to Appeal (Criminal) Nos.2730-2731 of 2005 against the proceedings were not continued, the trial against the appellants was likely to commence in the near future. In such circumstances, it would not be appropriate for this

Court, in these appeals, to delve into the details and veracity of the material appearing against the appellants. However, in each case, there were one or more eye witnesses who had identified the appellants as the ones active in the mob in the statements recorded immediately after the incident. According to their submissions, the Court must not lose sight of the contemporary factual scenario of widespread mob violence, over-stretched and limited police force and the urgent necessity of controlling the situation and investigating the crimes at the same time. Admittedly, there was no gainsaying that a horrendous crime of burning alive 59 persons in a packed railway coach was committed and even the passengers jumping out of the bogey to save their lives were attacked with weapons and pelting of stones. The whole operation was, *prima facie,* carried out in a pre-planned manner and a larger conspiracy to terrorise certain section of the people was writ large, according to the submission.

4.1 The learned Public Prosecutor, after referring to the police papers, relevant statements and panchnamas, submitted that the few policemen who had rushed to the spot at the relevant time had rounded up several persons from the mob, but another mob had attempted to facilitate fleeing of the rounded up persons. There was no time and no scope for formally arresting the accused immediately and making discovery or recovery panchnamas. However, there were more than one eye witnesses who had seen

and identified the appellants as being active with one or the other weapons in the mob. Inayat Abdul Sattar Jujhara who is claimed to have attended his office at the relevant time was in fact marked "absent" in the muster roll. As recorded in the judgment impugned in his appeal, two eye-witnesses have named him as operating in the mob with a weapon. And the affidavit of Dilip U. Dasadiya, who is stated to have contradicted his own statements before the police, is not a part of the record and, therefore, its authenticity could not be verified. However, if it were true and authentic, it might be a case of tampering with evidence even while the accused persons remained in jail. In case of Ishaq Mohammed Mamdu, his earlier bail application was withdrawn and rejected as such by the High Court on 4.7.2003 even as the statement of the doctor about his restricted vision was already on record. It was also pointed out from the judgment impugned in his appeal that the Court had found him to be attending the Court on his own without any aid and his role in instigating the crowd was, *prima facie*, found to be supported by statements of eye-witnesses. One of the appellants, namely Shabir @ Bhupat Bhuriyo Abdul Rahim Badam who was seen to be active with a *dhariya* in the mob by the aforesaid Dilip U. Dasadiya, is a person previously charged for several other serious offences and in fact convicted and sentenced to life imprisonment by the order dated 8.10.1997. He also submitted that even after three years of the incident, more than 20 accused persons were still

absconding and there were reasonable apprehensions of the appellants being not available at the time of trial since they are accused of such offences as may result into severest punishment.

4.2 Relying upon the recent judgments of the Supreme Court in ***Yunis alias Kariya v. State of M.P. [2003 SCC (Cri) 341]*** and in ***Sunil Kumar and Another v. State of Rajasthan [2005 SCC (Cri) 1230]***, it was submitted that even if no overt act was imputed to a particular person, when the charge was under section 149 IPC, the presence of the accused as part of an unlawful assembly was sufficient for conviction. The fact that the accused was a member of the unlawful assembly was sufficient to hold him guilty. And, where a group of assailants who were members of an unlawful assembly proceeds to commit the crime in pursuance of the common object of that assembly, it is often not possible for witnesses to describe the actual part played by each one of them and when several persons armed with weapons assault the intended victim, all of them may not take part in the actual assault. Therefore, it was not necessary for the prosecution to establish the specific overt act done by each accused.

5. It was seen from the impugned judgments that, after dealing with the specific plea and special circumstances of each of the appellants and after extensively referring to the statements recorded during investigation, the Court has found

that none of the appellants was just a passer-by or a person standing by and the Court could not conclude that he was an innocent passer-by who had either nothing to do with the conspiracy under section 120-B IPC or that he was not a member of the unlawful assembly. Having regard to the nature of the offence, possible punishment and possibility of interference with the course of justice, the appellants were not found to be entitled to be enlarged on bail on the facts revealed before the Court.

5.1 In such a criminal case of exceptional barbarity and magnitude, mere passage of time and likelihood of the trial taking years to be completed cannot be a ground for enlarging the accused persons on bail. Nor is this the stage when the role of an individual accused person can be scrutinized for categorizing him as not likely to be sharing the object of an unlawful assembly, or not privy to an agreement to do an illegal act since the composite effect of the activity of the so-called core group or the assault by the mob was killing of 59 men, women and children. The judgments impugned in each appeal has relied upon cogent material on record to arrive at the *prima facie* finding of involvement of the appellants. As seen hereinabove, the arrest of Inayat Abdul Sattar Jujhara is not based only on the statement of Dilip U. Dasadiya and Shabir @ Bhupat Bhuriyo Abdul Rahim Badam was otherwise supposed to be in jail pursuant to his conviction earlier. The affidavit of Dilip U. Dasadiya, which is sought to be

pressed into service without being placed on record, does not completely rule out the possibility of his presence at the time of the incident. Therefore, even if it were genuine and made out of his free will, the appellants concerned cannot take its benefit at this stage when the evidence against the appellants is yet to be recorded. In such circumstances, regardless of whether the accused persons were prosecuted under the provisions of POTA or only for the offences punishable, *inter alia*, under sections 302, 120-B and 149 IPC, the nature and scale of the offences and the severity of the punishment which may be imposed if the offences were proved, would disentitle the appellants from the discretionary relief of being enlarged on bail. The confessional statements recorded by the investigating agency under section 164 of the Cr.P.C. and those recorded under section 32 of the POTA have clearly indicated that a conspiracy was hatched, necessary inflammable material was collected and stored and the train was stopped at a particular spot by pulling chains while the mob attacked the particular coach from outside. By all accounts, the mob collected outside the coach was not a group of persons merely watching the spectacle of the burning bogey. Even the fire tenders appear to have not been permitted to rush to the spot, according to the police papers. In such circumstances, any reliable material indicating the presence of the appellants in the mob would, *prima facie,* be sufficient to implicate them in the serious offences.

6. Therefore, we are satisfied that these are not fit cases in which any of the appellants could be enlarged on bail. The learned Special Court (POTA) has rejected their bail applications for valid reasons. The appeals are accordingly dismissed.

Sd/-

(M.S.SHAH,J.)

Sd/-

(D.H.WAGHELA,J.)

(KMG Thilake)